APPEAL NO. 021085
FILED JUNE 21, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on April 2, 2002. The hearing officer gave presumptive weight to the designated doctor's report that the appellant (claimant) reached maximum medical improvement (MMI) from her _____, injury, on December 30, 1996, with a 0% impairment rating (IR). The hearing officer held that this report was not against the great weight of contrary medical evidence. The claimant has appealed, arguing that it is clear that her back surgery for her undisputed compensable injury has left her with impairment, such that the designated doctor's report is outweighed by the contrary medical evidence. There is no response from the respondent (carrier).

DECISION

We affirm.

Clearly, this was a complicated case for the hearing officer to decide; the claimant had at least two nonwork-related conditions that she said impacted her ability to have surgery, and apparently she claimed a shoulder and neck injury that also occurred on _____, as a separate claim. According to Texas Workers' Compensation Commission (Commission) records in evidence, the claimant received a 7% IR for her shoulder even though these areas were examined and appear to have been considered in the designated doctor's report for the back injury. On top of these facts, the claimant appears to have let several months, if not years, lapse before taking significant action on her claimed back injury. Although the claimant argued that her other medical problems (including a cardiac condition) affected her ability to have surgery or otherwise deflected her attention, the evidence also showed that she had surgeries for her shoulder injury and a nonwork-related condition prior to her April 2001 lumbar spinal surgery.

As another explanation for the delay, the claimant said that her back injury was attributed to a strain and sprain but the diagnosis was revised when a new treating doctor read the actual MRI films (rather than a written report assessing her back) and determined that the claimant had a herniated lumbar disc. A herniation that impinged on the cord was confirmed on a November 1997 myelogram. The claimant delayed having back surgery until April 2001, even after it was approved through the second opinion process in May 1998 (the carrier's second opinion doctor concurred). The claimant voluntarily delayed for two years taking a 1998 dispute over the designated doctor's opinion to a CCH, explaining that she was advised to wait until she had back surgery. The designated doctor delayed for two months his response to the benefit review officer's request that he review the myelogram report and other medical evidence, but responded in December 1998 that he stood by his earlier assessment. There is no evidence that he was asked to reconsider his opinion after the surgery. The

claimant's surgeon assigned a 14% IR. The claimant testified that her condition was not improved by her back surgery.

On one hand, a 0% IR with an MMI date well before statutory MMI seems counterintuitive, where the carrier does not dispute the extent of the back injury and ultimately paid for surgery. On the other hand, there is no doubt that delay in seeking surgery has impacted assessment of an IR at the time when statutory MMI was reached. The parties should not have to wait indefinitely for the IR issue to be determined, while the claimant undergoes a course of continuing medical treatment. Texas Workers' Compensation Commission Appeal No. 992829, decided February 2, 2000. The legislature has specifically provided that MMI is reached upon, if not before, the passage of 104 weeks (except for certain cases of spinal surgery set forth in Section 408.104, which was not effective for the claimant's date of injury). A lifetime potential for medical treatment does not translate into a lifetime ability to adjudicate the IR. While the Third Texas Court of Appeals in Fulton v. Associated Indemnity Corporation, 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied), held that the Commission could not arbitrarily shorten the 104-week period allowed in the statute to reach MMI, the Court also expressly stated that a worker whose condition deteriorated after the achievement of statutory MMI had no recourse under the 1989 Act, and described this as a "balance" struck by the statutory scheme in determining an IR.

We concur with applying this reasoning here, and thus cannot agree that the hearing officer's according of presumptive weight to the designated doctor's report, including the reaffirmation of that report following his review of additional medical records, is against the great weight and preponderance of the evidence here. We affirm the decision and order. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The true corporate name of the insurance carrier is **HARTFORD INSURANCE COMPANY OF MIDWEST** and the name and address of its registered agent for service of process is

C.T. CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Susan M. Kelley
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Philip F. O'Neill
Appeals Judge